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Supreme Court of the United States

No. 86.

OCTOBER TERM, 1906.

PEOPLE'S SAVINGS BANK,

PLAINTIFF IN ERROR

vs.

THE CITY OF DES MOINES AND THE CITY COUNCIL OF SAID CITY

AS A BOARD OF REVIEW

No. 88.

DES MOINES SAVINGS BANK,

PLAINTIFF IN ERROR,

vs.

THE CITY OF DES MOINES AND THE CITY COUNCIL OF SAID CITY,

AS A BOARD OF REVIEW.

In Error to the Supreme Court of the State of Iowa.

Brief and Argument for plaintiffs in error

NATHANIEL T. GUERNSEY,
Attorney for Plaintiff in Error People's Savings Bank.

GEO. F. KENNEY,
Attorney for Plaintiff in Error Des Moines Savings Bank.

Supreme Court of the United States

NO. 83.

OCTOBER TERM, 1906.

PEOPLE'S SAVINGS BANK,

PLAINTIFF IN ERROR

vs.

THE CITY OF DES MOINES AND THE CITY COUNCIL OF SAID CITY

AS A BOARD OF REVIEW

NO. 92.

DES MOINES SAVINGS BANK,

PLAINTIFF IN ERROR,

vs.

THE CITY OF DES MOINES AND THE CITY COUNCIL OF SAID CITY,

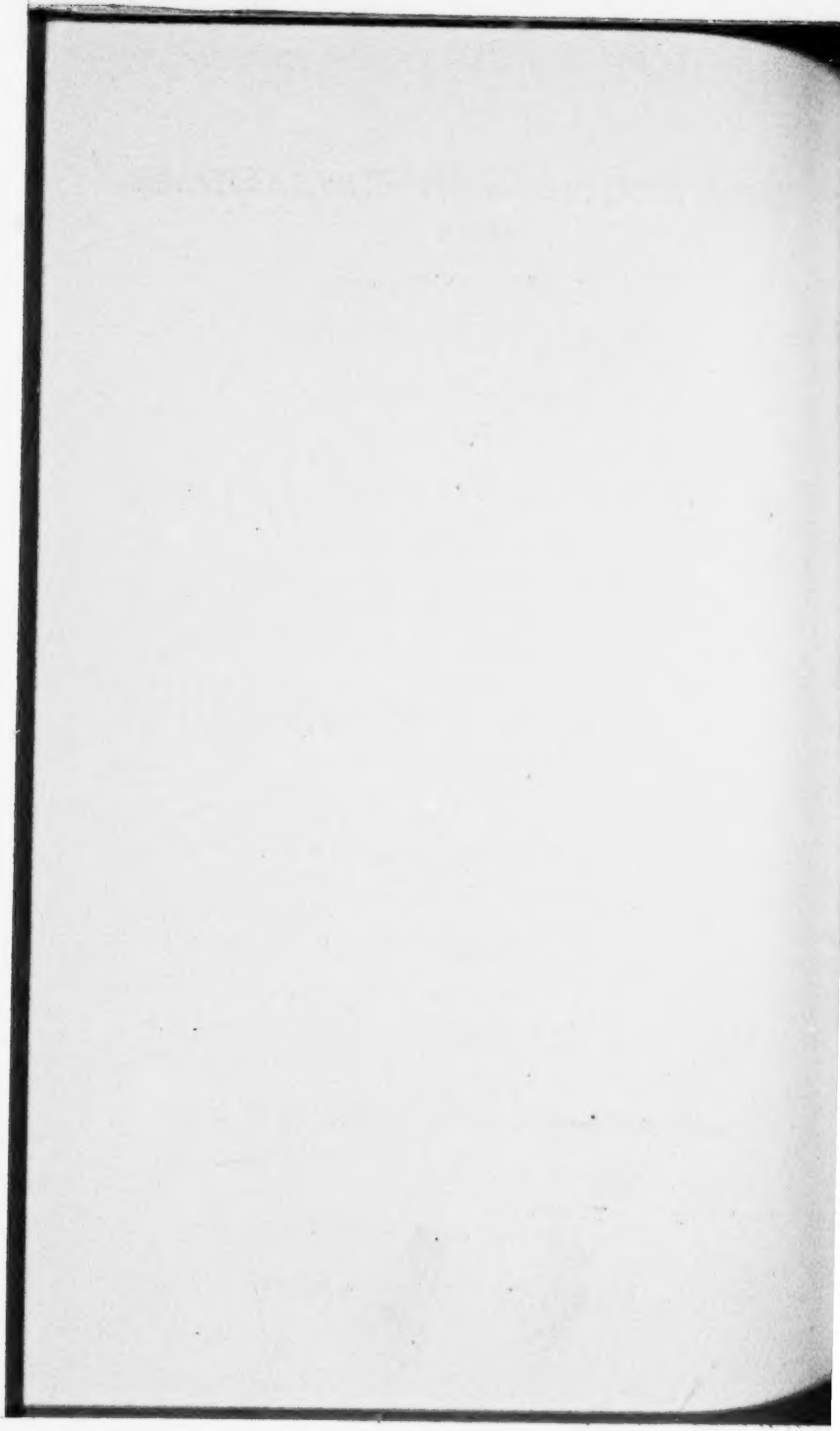
AS A BOARD OF REVIEW.

In Error to the Supreme Court of the State of Iowa.

Brief and Argument for Plaintiffs in Error

NATHANIEL T. GUERNSEY,
Attorney for Plaintiff in Error People's Savings Bank.

GEO. F. HENRY,
Attorney for Plaintiff in Error Des Moines Savings Bank.



Supreme Court of the United States

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PEOPLE'S SAVINGS BANK,

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vs.

THE CITY OF DES MOINES AND THE CITY COUNCIL OF SAID CITY

AS A BOARD OF REVIEW

Brief and Argument for Plaintiffs in Error

STATEMENT.

This case involves the validity of section 1322 of the code of 1897 of Iowa. It relates to the taxation of savings banks, and prescribes:

Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to the individual stockholders. At the time the assessment is made, the officers of national banks shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder under the head of corporation stock the total value of such shares.

It will be noted that the express provision is that the *shares of stock* of savings banks shall be assessed *to the banks* and *not to the individual stockholders.* There is no provision in this or any other statute of Iowa for the reimbursement of the bank, either by the shareholders or out of their property for the amount of such taxes.

When the plaintiff in error was assessed in 1902, it claimed the right to deduct from the amount of its capital United States bonds in which part of its capital was invested, in the sum of $62,060. This claim was denied, and the bank has brought the case here by writ of error directed to the supreme court of Iowa.

Broadly stated the contention of the bank upon the fundamental proposition is that the assessment complained of is vulnerable to one of the following objections:

(a) Either this statute is in fact a statute providing for the assessment of the capital of the bank so that it has the right to deduct the amount of its capital invested in United States bonds,

(b) Or, if this is an assessment upon the shares owned by the shareholders, then the statute provides for taxing the bank upon property which it does not own, and therefore deprives the bank of its property without due process of law and in contravention of the fourteenth amendment to the constitution of the United States, so that the entire assessment and tax are void.

General provisions of the Iowa code as to assessments for taxation.

In Iowa taxes are assessed and levied in the following

manner: The county auditor procures and furnishes to each assessor a supply of blank assessment rolls on which to enter the names of all persons, partnerships and corporations assessed, which rolls are made in duplicate. It is the duty of the assessor to detach the duplicate and deliver it to the person assessed. (Sec. 1360.) The form of these assessment rolls is indicated by Exhibits "3" and "4" (Trans. 11-13), Exhibit "3" being the duplicate and Exhibit "4" the copy of the roll which remained in the book, constituting the "stub" in such book. It is the duty of the assessor to assess every person in his township (Sec. 1354), and to notify him of the valuation, and, if he feels aggrieved, to appear before the board of review and show why the assessment should be changed (Sec. 1356). This notice is in the form shown at the end of Exhibit "3" and is prescribed by Section 1360 of the code.

It is the duty of the assessor to complete his assessment by the 1st of April (Code Sec. 1365) and to lay the rolls before the local board of review on or before the first Monday of April for correction, and after the correction has been completed by the board of review, to make up the assessor's books in duplicate from such assessment rolls (code Sec. 1366).

The city council constitutes the board of review for each city and is required to meet on the first Monday of April to adjust assessments for the city by raising or lowering the assessment of any person or corporation in such manner as to secure the listing of property at its actual value and the assessment of property as its taxable value (code Sec. 1370). Any person aggrieved by the action of the assessor may make oral or written complaint to the board of review and may appeal to the district court from the action of the board within twenty days after its adjourn-

ment. The court is required to hear the appeal in equity, and "determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof." (Code Sec. 1373.) Personal property is assessed as of January 1st, of each year.

The facts in detail.

In the instant case, the capital of the bank was made up of three items, capital stock $100,000, surplus $25,000, undivided profits $9,871.98, total $134,871.98. (See Exhibit "1," trans. page 7.)

Included in this amount was $62,060 invested in bonds of the United States, besides some real estate and stock in other corporations. On the 9th of April, 1902, the assessor assessed the bank and gave it the duplicate roll (Ex. "2," trans. page 9), showing the following assessment:

"*Moneys and credits* from form 2, $55,171.98."

The original roll or "stub" retained by the assessor was Exhibit "4," which then did not have the figures $122,871 upon it, but showed the same assessment shown by the duplicate. It will be noticed that Exhibit "2" and Exhibit "4" are both marked assessment roll, 1902, No. 6575, indicating themselves that one is the duplicate of the other.

Later, on the 22d of April, 1902, another duplicate was furnished to the bank, which is set out as Exhibit "3" (trans. page 11) and shows an assessment of $122,871 for "corporation stock." This was received by mail by the bank (trans. page 10). Note also the admission of page 14, as follows:

It is admitted by both parties that the stub Exhibit "4" is the only stub upon which the two notices, Exhibits "2" and "3" were issued, and that it is the only assessment in the assessment roll against the plaintiff.

On the same day the Peoples Savings Bank filed with the city council its protest, Exhibits "5" and "6," which are set out at page 15 of the transcript. The assessor's book was made up showing the assessment to the bank of $122,871 on account of *"moneys and credits."* The assessment as made by the assessors was confirmed by the board of review and an appeal was duly taken.

Jacob G. Beck, who made the assessment of $122,871, was sworn as a witness (trans. page 20). He says that the original assessment was based upon a deduction from the capital of the value of the bonds of the United States; that later he was advised by the city solicitor that this deduction ought not to be made; and that the assessment of $122,871 finally made included the amount invested in government bonds. He says:

There were changes made in the assessments of some of the other banks in Des Moines at about that time. There were not any savings banks here in Des Moines which owned government bonds whose assessments were not changed just about that time. It was an oversight if there were. And in each instance the assessments of these savings banks, when they were changed, were increased and the increase was probably to an amount equal to their holdings of government bonds.

As to whether when I came to change this assessment it was my opinion that it was too low because it did not include government bonds, it was my opinion that it was a proper assessment when I made it.

Q. I have no doubt of that, but this assessment that was shown by the assessment rolls was originally $55,171.98, and you increased that to $122.871. You

thought that this first assessment was wrong because it didn't include the government bonds?

A. They had been deducted from the value of their stock at that time; yes, sir.

Q. You evidently thought they ought to be included?

A. After I consulted with the city attorney I thought that they ought to be assessed for the value of their shares of stock irrespective of their government bonds.

Q. Without taking the bonds into account and deducting them?

A. Yes, sir.

Q. Just about this time this question had been referred to the city attorney?

A. Yes, sir.

Q. He had given an opinion saying these bonds ought not to be deducted in making this assessment?

A. I don't know. His opinion to me wasn't about that. It was simply as to how to make the assessment.

When I discovered that I had apparently made the assessments on an erroneous basis, because I had deducted these bonds, they were changed right through.

The assessment was sustained by the district court and by the supreme court of the state.

The laws of Iowa provide that in assessing the stock of corporations not covered by special statutes, the value of the shares shall be ascertained. From this value is deducted the value of the real estate, which is assessed directly to the corporations. The shares are assessed to the stockholders (code section 1323). The assets of the plaintiff included some shares in other corporations and the collateral question is presented whether these shares should have been taxed directly through the other corporations or through the taxation of the savings bank.

The questions presented here were raised by oral and written objections before the board of review (trans. page 5) by a written statement in the district court on appeal (trans. page 2) and by an assignment of errors in the supreme court of Iowa (trans. page 24).

SPECIFICATIONS OF ERRORS RELIED UPON.

The assignment of errors is set out on page 33 of the transcript. The errors relied upon by the plaintiff in error are the following:

First: That the supreme court of Iowa erred in rendering its judgment and decree affirming the assessment for taxation made against the plaintiff in error, in controversy in this cause, and affirming the said judgment and decree of the district court of the state of Iowa, in and for Polk county.

Second: That the supreme court of the state of Iowa erred in holding that the assessment complained of was not an assessment for taxation levied upon bonds of the United States which were the property of the plaintiff in error.

Third: That the supreme court of Iowa erred in holding that the bonds of the United States owned by the plaintiff in error were not exempt from taxation under the provisions of Section 8, Article I of the constitution of the United States.

Fourth: That the supreme court of Iowa erred in holding that the bonds of the United States owned b ythe plaintiff in error were not exempt from taxation under the provisions of Section 3701 of the Revised Statutes of the United States.

Fifth: That the supreme court of Iowa erred in holding that the bonds of the United States owned by the plaintiff in error were not exempt from taxation under the provisions of the act of congress under which said bonds were issued, it being an act entitled, "An act to provide ways

and means to meet war expenditures and for other purposes," approved June 13, 1898.

Sixth: That the supreme court of Iowa erred in holding that the property of the shareholders of the plaintiff in error would be assessed and taxed to the plaintiff in error, without provision for its reimbursement for taxes so paid, by the owners of the property taxed, because,

(*a*) To so hold is a denial to the plaintiff i nerror of the equal protection of the laws, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

(*b*) To subject the plaintiff in error to such taxation constitutes a taking of the property of the plaintiff in error without due process of law in contravention of the provision of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of his property without due process of law.

Seventh: That the supreme court of Iowa erred in holding that the assessment in question could properly be made under Section 1322 of the code of 1897 of Iowa, because:

(*a*) If the said section authorizes the assessment of bonds of the United States for purposes of taxation the same is void because in contravention of Section 8, Article I, of the Constitution of the United States.

(*b*) If said section authorizes the assessment for purposes of taxation of bonds of the United States the same is void because in contravention of Section 3701 of the Revised Statutes of the United States.

(*c*) If said section authorizes the assessment for tax-

ation of said bonds of the United States the same is void because in contravention of the express provisions of the Act of Congress under which said bonds were issued, it being an act entitled, "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898.

(*d*) If the said section authorizes the assessment for taxation of the bonds of the United States which were sought to be assessed, the same is void because in contravention of the provision of Section 1, Article XIV of the Amendments to the Constitution of the United States that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States because under both the laws and Constitution of the United States plaintiff in error was entitled to hold the bonds in question exempt from taxation by the state of Iowa.

(*e*) If the said section authorized the assessment against the plaintiff in error for purposes of taxation of the shares of its stock which are the property of its shareholders, and the exaction from the plaintiff in error of taxes levied upon such assessment then the said section is void because in contravention of the provision of Article XIV of the Amendments to the Constitution of the United States which provides, "nor shall any state deprive any person of life, liberty or property without due process of law," there being no provision in the laws of the state of Iowa for the reimbursement of the plaintiff in error for taxes so exacted from it.

(*f*) If the said .section authorizes the assessment against the plaintiff in error for purposes of taxation of the shares of its stock which are the property of the shareholders, and the exaction from the plaintiff in error of taxes levied upon such assessment, then the said section is

void because in contravention of Section 1 of Article XIV of the Amendments to theConstitution of the United States which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The laws of Iowa provide that all property shall be taxed to the owners thereof, and where corporations other than savings banks are made primarily liable for taxes imposed upon their shares of stock, provide for their reimbursement, but these laws make no provision for the reimbursement of savings banks on account of taxes levied against the shares of their stock and exacted from the banks.

Eighth: That the supreme court erred in holding that the plaintiff in error is subject to taxation, without reimbursement upon shares of stock not owned by it, because:

(*a*) Such taxation amounts to a taking of the property of the plaintiff in error without due process of law, in contravention of the provision of Section 1, Article XIV of the Amendments to the Constitution of the United States that no state shall deprive any person of his property without due process of law.

(*b*) Such taxation amounts to denial to the plaintiff in error of the equal protection of the laws, in contravention of the provision of Section 1 of Article XIV of the Amendments to the Constitution of the United States, that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Ninth: That the supreme court of Iowa erred in refusing to deduct from the assessment of the plaintiff in error the item of $4,040 on account of stocks in other corporations owned by it.

Tenth: That the supreme court of Iowa erred in refusing to deduct from the assessment in controversy the item

of $8,480 on account of real estate owned by the plaintiff in error.

POINTS.

I.

In so far as Section 1322 of the code of Iowa authorizes the taxation of the bonds of the United States it is void because in contravention of the constitution and statutes of the United States.

Rev. Stat. U. S., Sec. 3701.

Weston vs. City of Charleston, 2 Pet. 448.

Bank vs. New York, 2 Black 620.

Bank Tax Cases, 2 Wall. 200.

Act of Congress entitled, "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898.

II.

Section 1322 of the code of Iowa.

This section provides that shares of stock of state and savings banks shall be assessed to such banks and not to the individual stockholders. It distinguishes between shares of stock in national banks and in savings banks, the former being assessed to the shareholders, the bank being merely the collecting agent and the shareholders being permitted to deduct their debts, while the latter are assessed to

the bank, which is required to pay the tax, without any right to reimbursement from the shareholder, the shareholder having no right to deduct debts.

Bank vs. Rerick, 96 Iowa 238, 242.
Code section 1325.

III.

The decisions of the supreme court of Iowa.

The supreme court of Iowa has construed Section 1322 of the code in

German American Savings Bank vs. City of Burlington, 118 Iowa 84;
National State Bank vs. City of Burlington, 119 Iowa 696.
First National Bank vs. City of Independence, 123 Iowa 482.

The leading case is the *German American Savings Bank* case, the subsequent cases merely following it. In that case the court says:

(*a*) The statute requires the taxation of the shares, which are the property of the shareholders;

(*b*) Under the doctrine of *Van Allen vs. Assessors,* this is not a tax upon the government bonds;

(*c*) The tax is upon the property of the bank and the assessment is therefore not vulnerable to the objection that it is an assessment upon property not owned by the bank.

Bank vs. Rerick, 96 Iowa 238, does not decide that such an assessment is proper, but merely decides that it does not violate certain provisions of the constitution of the state of Iowa.

IV.

Section 1322 of the code of Iowa, in fact imposes a tax upon the capital of the plaintiff in error, and therefore its government bonds should have been deducted.

The construction of this section announced by the supreme court of Iowa must be accepted.

Railroad Co. vs. Kentucky, 183 U. S. 503, 507.

The tax imposed by this statute, as it is construed by the supreme court of Iowa, is nothing more than a tax on capital, void in so far as the capital is invested in government bonds.

Code Section 1321.

The tax is against the owner of the bonds, upon an assessment which includes the value of the bonds, without provision for reimbursement by the shareholder. It therefore does not come within the rule of

Van Allen vs. Assessors, 3 Wall. 573,

because the tax is neither assessed against nor paid by the owner of the bonds.

The court will look to the substance and effect of the statute.

Home Insurance Co. vs. New York, 134 U. S. 594, 598.

Applying this test, the statute is a tax on the capital of the corporation.

New Orleans vs. Houston, 119 U. S. 278;
St. Johns National Bank vs. Bingham Township, 113 Mich. 203.

and this is held in the German American Savings Bank case.

The doctrine of equivalency invoked by the supreme court of Iowa makes the tax in fact a tax on the bonds.

Owensboro Nt'l Bank vs. Owensboro, 173 U. S. 664.

A tax on the value of the capital is a tax on the property in which the capital is invested.

Railroad Co. vs. Pennsylvania, 198 U. S. 341, 353.
Stapylton vs. Thaggard, 91 Fed. 93.
National Bank of Virginia vs. City of Richmond, 42 Fed. 877.
Brown vs. French, 80 Fed. 166.

To the same effect in principle are the cases holding that the shares of a national bank cannot be taxed to it *in solido.*

First National Bank vs. Fisher, 45 Kans. 726.
National Bank of Chemung vs. City of Elmira, 53 N. Y. 49.
Sumpter County vs. National Bank of Gainesville, 62 Ala. 464.

City of Springfield vs. First National Bank, 87 Mo. 441.
First National Bank vs. Meredith, 44 Mo. 500.
National Com. Bank vs. City of Mobile, 62 Ala. 284.

See also

National Bank vs. Hoffman, 93 Iowa 119.
People ex rel. vs. Coleman, 126 N. Y. 433.

V.

The statute cannot be sustained upon the theory that it makes the bank a mere collecting agent for the state.

In such cases the tax is not upon the property of the bank, and provision is always made for its reimbursement.

Stapylton vs. Thaggard, 91 Fed. 93.
Bank vs. Commonwealth, 9 Wall. 353, 362.
Hershire vs. First Nat'l Bank, 35 Iowa 272, 277.

There is no conflict between these cases and

Cleveland Trust Co. vs. Lander, 184 U. S. 111.

There the law provided for taxing the shares to the shareholder and for reimbursement by him.

VI.

If Section 1322 requires the taxation of the shares of the shareholders to the bank, it is void because within the inhibition of the fourteenth amendment.

A tax exacted without jurisdiction is the taking of property without due process of law.

Railroad Co. vs. Pennsylvania, 198 U. S. 341.
Corry vs. Baltimore, 196 U. S. 466.

If what this statute requires is a tax upon the property of the shareholders assessed against and to be paid by the bank, without provision for its reimbursement, the bank is deprived of its property without due process of law, and the law itself is void.

State Tax on Foreign-held Bonds, 15 Wall. 300, 319.
Cooley on Taxation (3d ed.), pages 1, 3, 12 and 27.
County of Santa Clara vs. Southern Pac. R. Co., 18 Fed. 385, 392.
United States vs. Railroad Company, 17 Wall. 322.
Henkle vs. Town of Keota, 68 Iowa 334.

VII.

Relief to which the plaintiff in error is entitled.

(*a*) If section 1322 requires the payment of taxes upon property not owned by the bank, it is void, and the entire assessment and tax are void, and should be set aside.

(*b*) If the statute contemplates an assessment upon the property of the bank, its capital invested in government bonds should be deducted from the gross capital, and, after deducting its real estate and corporation stocks, the balance is the amount of the assessment.

Campbell vs. City of Centerville, 69 Iowa 439.

Under the code of Iowa, a bank is entitled to recover back taxes illegally exacted from it, even though they were voluntarily paid; so that the payment of these taxes under protest, as was done in the case at bar (trans. p. 19) is not a waiver of any rights of the bank.

Code Section 1417.
Lauman vs. Des Moines County, 29 Iowa 310.
Richards vs. Wapello County, 48 Iowa 507.
Winzer vs. Burlington, 68 Iowa 279.
Thomas vs. Burlington, 69 Iowa 140.
Lonsdale vs. Carroll County, 105 Iowa 452.

ARGUMENT.

I.

In so far as Section 1322 of the code of Iowa authorizes the taxation of the bonds of the United States it is void because in contravention of the constitution and statutes of the United States.

This proposition will not be controverted. See

Rev. Stat. U. S., Sec. 3701.
Weston vs. City of Charleston, 2 Pet. 448.
Bank vs. New York, 2 Black 620.
Bank Tax Cases, 2 Wall. 200.
Act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898.

II.

Section 1322 of the code of Iowa.

This section, in its entirety, is as follows:

Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. *Shares of stock of state and savings banks* and loan and trust companies *shall be assessed to such banks* and loan and trust companies *and not to the individual stockholders.* At the time the assessment is made, the officers of *national banks* shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the corporations shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including any statement furnished to and information obtained by the auditor of state, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate, owned by them, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed.

Note the distinction made between the shares of stock of national banks and the shares of stock of state and savings banks. The shares of a national bank must be assessed to the individual stockholders, at the place where the bank is located. The shares of state and savings banks are to be

assessed to such banks *"and not to the individual stockholders."* The officers of national banks are required to furnish the assessor with a list of all the stockholders and the number of shares owned by each, and the assessor is required to "list to each stockholder under the heading of corporation stock the total value of such shares."

The shares of the national banks are assessed to the individuals, to the people who own them. The shares of the savings banks are to be assessed to the banks; and it is expressly stated that they shall not be assessed to the stockholders who own them. The stockholders of savings banks are not to be listed with the assessor, and the assessor is not required to list to each stockholder the value of his shares.

In

Bank vs. Rerick, 96 Iowa 238, 242,

the supreme court of Iowa referring to the sections of the code relative to the taxation of shares of stock in banks, points out the radical differences between the rules applicable to state and national banks. The court says:

These provisions make the association liable on the taxes levied upon the shares of a stockholder only to the amount of dividends which may be payable on account of the shares, and possibly for other property of the shareholders, if any, under the control of the association. *Hershire vs. Bank*, 35 Iowa 272. But the shares must be assessed as the property of the owner. An assessment of them to the association is void. *Bank vs. Hoffman*, 93 Iowa 119 (61 N. W. Rep. 418). And such shares are credits, within the meaning of section 814 of the code, from which the owner is

entitled to deduct the debts which he is in good faith owing. *First Nat. Bank of Albia vs. City Council of Albia*, 86 Iowa 34 (52 N. W. Rep. 334).

The sections of the code just considered are unlike the act of the Twenty-third General Assembly in question. That provides that the shares of the capital stock of the association to which it refers shall be assessed, not to the shareholder, but to the association. Whether such shares are credits, from which the owner may deduct his debts for the purpose of taxation, is referred to in argument, but as the references so made are brief, and since the question is not necessarily involved in the determination of the cause, we prefer to leave it undecided. It was mentioned, but not decided in *First Nat. Bank of Albia vs. City Council of Albia, supra.*

The Rerick case was decided under a statute earlier than the one now under consideration, upon which the present enactment was based. It is set out in the opinion, and does not essentially differ from the present law. The requirements of Section 1322 that a statement be furnished the assessor to enable him to ascertain the value and that real estate be deducted seem to apply to both classes of banks.

Section 1325 of the code is the general provision requiring corporations to pay the taxes assessed to their shareholders, and protecting them in their right to recover back money so paid. This is the only provision for the recovery of such payments, and the court will observe that it is limited to cases where the tax is assessed to the shareholder, so excluding savings banks from its operation.

Section 1325 is as follows:

The corporations described in the preceding sections shall be liable for the payment of *the taxes assessed to the stockholders of such corporations,* and such tax shall be payable by the corporation in the same manner and under the same penalties as in case of taxes due from an indi-

vidual tax payer, and may be collected in the same manner as other taxes, or by action in the name of the county. Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving the stockholders thirty days' notice of the amount of such tax and the time and place of sale, such notices to be by registered letter addressed to the stockholder at his postoffice address, as the same appears upon the books of the company, or is known by its secretary.

There is nowhere in the laws of Iowa any provision under which a savings bank has the right to reimburse itself from its stockholders or their property on account of the payments made by it for taxes assessed against it under section 1322 of the code of Iowa. There is such provision in favor of every other corporation which is made the collecting agent for taxes levied against its shareholders. Section 1325 *supra* does not refer to them; it only refers to corporations whose stockholders are assessed.

It is not suggested by the supreme court of Iowa, nor has it been claimed by counsel that savings banks have the right to recover these taxes from their shareholders. This contention is negatived by the holding that the bank is in effect taxed on its own property.

III.

The decisions of the supreme court of Iowa.

The supreme court of Iowa had occasion to construe section 1322 of the code in

German American Savings Bank vs. City of Burlington, 118 Iowa 84;

National State Bank vs. City of Burlington, 119 Iowa 696;

First National Bank vs. City of Independence, 123 Iowa 482;

as well as in the case at bar and the cases which were submitted with it.

The leading case is the *German American Savings Bank* case. In the subsequent cases but little had been done but to re-affirm it, and the case at bar was affirmed on that opinion, so that it is in effect the opinion in this case. In the German American Savings Bank case, the court held that section 1322 required the assessment to be made upon the shares of stock, as distinguished from the capital stock which is the property of the bank. So construing the statute, it determined that the value of the bonds could not be deducted, because the tax was not upon the property of the bank, but upon the property of the shareholder; and basing its conclusion upon the doctrine of equivalency, held that the objection that the tax was upon property not owned by the bank was not sound. So far as the opinion is material we quote it:

Section 1322 of the code provides that "shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies, and not to the individual stockholders." The contention of the appellee that the assessment in this case was in fact upon the capital of the bank, instead of an assessment of the shares of stock, is not sustained by the record. On the other hand, it appears clearly to us that the council intended to assess the shares of stock to the bank as provided in the section referred to, and that the assessment

was so made in fact. There is a well-defined and well-recognized distinction between the capital of a bank and the shares of its stock. Indeed, we do not understand that this proposition is seriously questioned by the appellee. *First National Bank of Louisville vs. Kentucky,* 9 Wall. 358 (19 L. Ed. 701); *Farrington vs. Tennessee,* 95 U. S. 686 (24 L. Ed. 558). The shares of stock having been assessed to the bank as provided by law, instead of to the stockholders, may the bank deduct from such assessment the United States bonds held by it as a part of its capital, because of their exemption from taxation? The negative of this proposition is well settled by the highest authority. The tax on the shares of stock of a bank is not a tax on its capital. *Van Allen vs. Assessors,* 3 Wall. 573 (18 L. Ed. 229); *Farrington vs. Tennessee, supra; Railroad Co. vs. Morrow,* (Tenn.), 11 S. W. Rep. 348 (2 L. R. A. 853); *Hubbard vs. Board,* 23 Iowa 130; *Bank vs. Rerick,* 96 Iowa 238. See, also, note in *McHenry vs. Downer* (Cal.), 45 L. R. A. 737 (s. c. 47 Pac. Rep. 779), on the subject generally. The tax in this case, not being on the capital of the bank, but upon the shares of stock held by the individuals, the bank had no right to deduct therefrom its United States bonds. *First National Bank of Louisville vs. Kentucky, supra; Palmer vs. McMahon,* 133 U. S. 666, 10 (Sup. Ct. Rep. 324, 33 L. Ed. 772); *Trust Co. vs. Lander* (Ohio), 56 N. E. Rep. 1036, and *Trust Co. vs. Lander* (22 Sup. Ct. Rep. 394, 46 L. Ed. 456). And it is in this respect that the case at bar is distinguished from *Ottumwa Sav. Bank vs. City of Ottumwa,* 95 Iowa 176, and *State Exch. Bank of Parkersburg vs. Town of Parkersburg,* 112 Iowa 104, in both of which cases the question of the taxation of the capital of the bank was alone involved. Whether, under this statute, the capital may be taxed as well as the shares of stock, we do not determine, for no such question is before us, no attempt having been made to tax the capital of the bank. The statute under consideration is simply an enlargement of Chapter 39 of the acts of the 23d General Assembly, and is in no sense different therefrom in so far as it applies to banks organized under the laws of this state. Under that act it was held in *Bank vs. Rerick,* 96 Iowa 238, that banks designated therein were liable for the tax assessed to them on the shares of stock held by individuals, and it is said in answer to the contention that the bank, under such cir-

cumstances, would be paying taxes on property that it did not own; that, "as the capital of a state bank is really owned by the stockholders, and as it is reduced by the amount paid for taxes, its value is reduced by a sum equal to that paid, and the shareholders do, in effect, pay the taxes." This proposition cannot be successfully controverted, for the reason that the bank is owned by its stockholders, and, if it is making money and is paying dividends or reserving a surplus, the payment of the tax by the corporation, instead of by the individual stockholders, affects the value of the stock exactly the same; and this is equally true if the bank is not prosperous. This method of assessing and taxing the shares of stock of banks was undoubtedly adopted for convenience, and for the purpose of reaching valuable property which might otherwise escape its just share of the public burdens, and does not, in our judgment, compel payment of the tax by those who do not own the property.

Bank vs. Rerick, 96 Iowa 238,

referred to in connection with the doctrine of equivalency in the foregoing excerpt, does not decide the question that is presented in this case. It arose under a statute which provided that the shares of state or commercial banks should be assessed to the banks and not to the individual shareholder. It was contended that this statute violated the provision of the state constitution prohibiting the granting of special privileges or immunities and the passage of local and special laws, and further that the taxes were not uniform, because the holders of stock in national banks had the right to deduct debts from their assessments, which could not be done by the holders of the shares in these state banks. These are the constitutional questions decided in that case.

In the two national bank cases that have been cited, in

119 and 123 Iowa, the court in each instance treated the case as ruled by the German American Savings Bank case, ignoring the radical difference between the law as to national banks and the law as to savings banks. In the present cases, a short *per curiam* opinion was filed, which did not discuss the questions involved.

To summarize, the construction of this statute adopted by the supreme court of the state is that it requires the taxation of the shares and not of the capital, in such a sense that the bank may not deduct its bonds, but that the tax is not upon shares in such a sense that the bank is taxed on property not owned by it, but by its shareholders.

IV.

Section 1322 of the code of Iowa, in fact imposes a tax upon the capital of the plaintiff in error, and therefore its government bonds should have been deducted.

We are not unmindful of the rule that the consideration which this court may give to a question of this kind is to be restricted to its federal aspect. As was said by this court in

Railroad Co. vs. Kentucky, 183 U. S. 503, 507:

> Of course, our consideration of it must be restricted to its federal aspect; in other words, we are to inquire whether the state enactments, constitutional and statutory, in the particulars involved in this controversy, and under the construction given them by the court of appeals, are in conflict with the Fourteenth Amendment of the Constitution of the United States.

Our contention is that as construed by the supreme court of Iowa the tax imposed by the statute in question is in effect nothing but a tax on capital, and so, consequently, to the extent to which that capital is invested in government bonds, beyond the power of the state and void.

We invite the attention of the court to a further consideration of just what the supreme court of Iowa has decided. It is that a savings bank under this section may be taxed on the value of its capital less real estate, including United States bonds held by it.

The section, it is true, says the "shares * * * shall be assessed to such banks." But the same section also says:

> To aid the asessor in fixing the value of such *shares*, the corporations shall furnish him a verified statement of all the matters provided in the preceding section which shall also show separately, *the amount of capital stock, and the surplus and undivided earnings*, and the assessor * * * shall fix the value of such *stock, taking into account the capital, surplus and undivided earnings.*"

It is significant that here in the next to the last line the word "stock" is used instead of the word "shares" which first appears in this section. The idea that the tax is in fact to be levied upon the property of the bank instead of upon the shares of stock is emphasized by the last phrase of the section, which is as follows, "and the property of such corporations shall not be *otherwise* assessed." Note here that what the statute says is not that the property of the corporation shall not be assessed, but that the property shall not be *otherwise* assessed, the use of the word "otherwise" characterizing this assessment as in the mind of the legislature, an assessment upon the property of the bank. The

statement referred to as "provided in the preceding section," is, to quote from the section referred to:

"a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January 1st of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;

3. The amount of all deposits made with them by others and also the amount of bills payable;

4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof.

This is a statement "showing the assets" that is the property of the bank. The value of the shares as so ascertained is nothing more nor less than the value of the capital or assets of the bank, less its real estate, but including its United States bonds. The result is exactly the same as if the assessment were in form as well as in fact, an assessment directly upon capital.

The assessment is against the bank; the tax is paid by the bank, out of its own funds; and the valuation upon which the tax is levied includes the value of the United States bonds. No distinction whatever is made between these bonds and the other personal assets of the bank.

Unless the bonds are taxed, no personal assets of the bank are taxed to it, and all taxes paid by it are paid upon the property of its shareholders.

This is not the doctrine of

Van Allen vs. Assessors, 3 Wall. 573,

and the long line of cases holding that to tax the share to the shareholder is not taxing its capital to the bank. In these cases the value of the government bonds owned by the institution in question does not directly or indirectly form the basis of any tax levied against *it*, and the tax *is not levied against the owner of the bonds;* while under the statute in question here, the tax is based upon the value of the bonds, and is levied against their owner. In the Iowa case the statute is so construed as to require the owner of the bonds to pay the tax, and to pay just exactly the tax that he would pay if the assessment were in form made upon the bonds *eo nomine*, while in *Van Allen vs. Assessors* and the cases of its class, the statutes under consideration were sustained solely because they exacted nothing from the owners of the bonds. This distinction is the very gist of the whole matter.

The rule is perfectly well settled that this court, in order to determine whether a statute violates the federal constitution or statutes, will look not to its form, but to its substance, and consequences. If its result is to subject bonds of the United States constituting a part of the capital of a savings bank, to the same burden of taxation that its other personal property bears, then the exemption of these bonds under the federal constitution has been nullified. This is the important and controlling factor.

The method devised to effect this result is wholly immaterial. This court said in

Home Insurance Co. vs. New York, 134 U. S. 594, 598:

Nor can this inhibition upon the states be evaded by any change in the mode or form of the taxation, provided the same result is effected—that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon the power of the government, the law creating it will be set aside or its enforcement restrained. Thus in *Henderson vs. Mayor of New York,* 92 U. S. 259, 268, a statute of New York provided that the master or owner of any vessel bringing passengers from foreign ports into the port of New York should give a bond in the sum of $300 for each passenger landed, against his becoming a public charge for four years thereafter, or pay within twenty-four hours thereafter $150 for each passenger, and that, if neither bond was given nor payment made, a penalty of $500 for such failure would be incurred, which should be a lien upon the vessel. It was contended that the object of the requirement was not taxation, but protection against pauperism, and therefore valid as within the police power. But the court said that in whatever language the statute may be framed its purpose must be determined by its reasonable and natural effect, and judged by that criterion the tax was either on the owners of the vessel for the right of landing passengers or upon the passengers themselves; and that, therefore, the statute was a regulation of commerce and void.

To the same purport is the familiar case of *Brown vs. Maryland,* 12 *Wheat.* 419, so often cited in this court, where it was contended that a license tax required of an importer to sell his goods, while held in bulk as imported, was a tax only upon his occupation. But the court observed that this was only changing the form without varying the substance of the tax, adding that "it is treating a prohibition which is general as if it were confined to a particular mode

of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

If this test be applied to the statute under consideration, if its purpose be determined by its reasonable and natural effect, then there can be no doubt but that, as construed by the supreme court of Iowa, it in effect subjects these bonds to state taxation.

The case

New Orleans vs. Houston, 119 U. S. 278,

is squarely in point upon this proposition.

In that case the legislature had exempted a corporation from all taxes in excess of $40,000 per annum. A law was passed which provided for a tax upon the shares of the shareholders, to be paid by the corporation. There the law gave the corporation a right, limited to the amount of dividends in its hands, to recover back from the stockholders; while under section 1322, the corporation has no right to recover anything back from the stockholders. In the New Orleans case this court decides that this was a tax upon the property of the corporation and not a tax upon the shares of the shareholders and that the act in question was void. We quote from the opinion in that case as follows:

But the question of legislative intent is always open upon the language of the exemption. In the present case the corporation is exempted by its charter from all other taxes and licenses of any kind whatever in excess of the sum of $40,000 per annum, and yet by Act. No. 77, though the as-

sessment is not to be made upon its capital stock, but upon the shares of shareholders appearing upon its books, nevertheless, the tax so assessed is to be paid by the company, although it is entitled to collect the amount so paid from the shareholder on whose account it is payable; but this payment by the company is to be made irrespective of any dividends or profits payable to the shareholder out of which it might be repaid. That it is substantially a tax upon the corporation itself, is unequivocally shown by the subsequent clause, which authorizes a deduction from the amount of taxes assessed to each share of its proportion of the direct property taxes paid by the company as such under sections 1 and 3, and of all exempt property belonging to the corporation. But as all the property of the Louisiana State Lottery Company is exempt from taxes after payment of the annual sum of $40,000, nothing remains to be changed as a tax upon the shareholders as distinct from the corporation under the provisions of this section. Indeed, it is quite apparent from the language of the whole section, that, while nominally the taxes authorized are not to be assessed upon the capital stock of the corporation in the aggregate and as its property, yet in substance that is its effect. The taxes are assessed upon the actual shares as registered in the names of the individual shareholders, but are to be paid by the corporation, *so that while the form and mode of taxation is changed, its substance remains as though assessed against the corporation by name.*

The case just cited is decisive here. It decides that where a corporation is taxed upon the shares of its shareholders without provision for reimbursing it fully, this is in effect, a tax upon the property of the corporation. In the case at bar, there is no right to recover back any portion of the tax paid. There is no pretense that it is not a tax exacted directly and solely from the corporation.

In the foregoing extract it is said that the tax here in question is unequivocally shown to be a tax on the corporation itself by the fact that these taxes were to be de-

ducted from the taxes levied on the shares. This argument is entirely applicable here, because here the taxes paid by the bank, are in lieu of all taxes paid by the shareholders. The statute under consideration does not stop with making the shares assessable to the bank, but expressly prohibits their assessment to the shareholders. Here, as there, this shows unequivocally that this is a tax on the corporation itself; here, as there, it is apparent from the whole section, as construed by the supreme court of Iowa, that *"while nominally the taxes authorized are not to be assessed upon the capital stock of the corporation in the aggregate and as its property, yet in substance that is its effect."*

The doctrine of *New Orleans vs. Houston* is reaffirmed in

St. Johns National Bank vs. Bingham Township,
113 Mich. 203.

This was an action brought by the bank to enjoin a tax collector who was seeking to enforce against the bank certain taxes levied against the holders of certain of its shares in a case where the bank had acquired the title to the shares prior to the time at which the taxes became a lien upon the shares. With reference to this matter the court said:

The defendant in no event would have the right to compel the bank to pay upon the other shares, the sale having been made before the tax became a lien. A bank cannot be compelled to use its assets to pay a tax where it cannot reimburse itself against the stock, as provided by law. *City of Boston vs. Beal,* 51 Fed. 306; *New Orleans vs. Houston,* 119 U. S. 265, 7 Sup. Ct. 198. If this could be done, it would substantially be a tax upon the corporation itself.

Note that this case squarely recognizes the doctrine that the power to compel a bank to act as a collecting agent does not include the right to compel it to pay taxes where no provision is made for its reimbursement; and further that the court says that such a course would be in effect a tax upon the corporation itself.

In the latter part of its opinion in the *German American Savings Bank* case, set out *supra*, the supreme court of Iowa itself adopts the position that the tax imposed by this statute is in effect a tax on the property of the bank, in reaching the conclusion, stated at the end of the excerpt quoted, that this method of taxation "does not * * * compel payment of the tax by those who do not own the property." The property referred to is of course the property taxed. The opinion therefore, while sustaining the tax is in form a tax on the shares, concedes that it is in substance and effect a tax on the property of the bank, including the United States bonds in question. This is in harmony with our entire argument upon the effect of this statute.

We respectfully submit that the supreme court of Iowa erred, under such circumstances and upon the authority of *Van Allen vs. Assessors* and like cases, in applying the distinction between the taxation of the shares to the shareholder and the taxation of the capital to the bank. In a most lucid and exhaustive exposition of this matter this court in

Owensboro National Bank vs. Owensboro, 173 U. S. 664,

has demonstrated that where the property taxed is in ef-

fect the property of the bank, the tax is illegal, and does not come within the rule of the *Van Allen* case.

In a single paragraph the result of the discussion is stated thus:

It is to be remarked that it is patent from the opinion of the court that, if the shares of stock had been considered as in anywise the equivalent of the bonds, in which the property of the bank was invested, the tax would have been held invalid despite the authority to tax the stock given by the act of congress, as such authority would not have been construed as authorizing a violation of the faith of the United States by taxing bonds issued by the government which were not subject to taxation. It follows then that not only did this decision refute the claim of equivalency between the tax on the bank or its property or franchise and the tax on the stock in the names of the stockholders, but by a negative affirmative it demonstrates that if the two are equivalent the tax in this case would be illegal, since the record here admits that a sum, at least the equivalent of the capital, surplus and undivided profits of the bank, was invested in bonds of the United States. The contention of equivalency then destroys itself, and if it were conceded would bring about the illegality of the tax, in support of the legality of which the argument is advanced.

If, therefore, the supreme court of Iowa is right, and this is in effect a tax on the property of the bank, the tax is necessarily illegal, and that court misapplied the doctrine of *Van Allen vs. Assessors.*

To quote more at length from the *Owensboro* case, the court there says:

It is, however, urged that whilst the taxes may not be in form imposed on the shares of stock in the names of the shareholders, and may be in form a tax on the franchise or

property of the bank, nevertheless they are equivalent to a tax on the shares of stock in the names of the shareholders, and therefore do not violate the act of congress. But this proposition concedes that the taxing statute does not conform to the act of congress, and yet invokes its permissive authority, since, as already shown, without the grant made by the act of congress there would be no power to tax at all. Passing, nevertheless, this contradiction, and looking beneath the mere form, we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact. Does it contain either? is the question.

To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the states to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders. A brief review of the two classes of cases, by which the doctrines just stated are overwhelmingly established, will make the foregoing result clear. The earliest case in the reports of this court is *Van Allen vs. The Assessors* (1865), 3 Wall. 573. The tax was on the shares of stock in the names of the shareholders, pursuant to the act of congress. Two issues were presented, one the assertion that the state banks were assessed on their capital and surplus, and therefore that stockholders in national banks were substantially discriminated against. This was held to be well taken; clearly, therefore, deciding that there was no equivalency between taxing the capital and surplus in the hands of the bank and taxing shares in the names of the shareholders, for if the two had ben equivalent the decision would necessarily have been otherwise. The other question in the

case was thus stated by the court, through *Mr. Justice Nelson,* page 581:

"The main and important question involved, and the one which has been argued at great length and with eminent ability, is, whether the state possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly invested in stocks and bonds of the United States."

This question was examined, and it was decided that, as the shares of stock in the hands of the shareholders were distinct and different subjects—matter of taxation from the property or rights of the bank, that therefore the power conferred by congress could be exercised so as to tax the shareholders, even although the property of the bank was invested in non-taxable bonds of the United States, because the two were distinct and different things.

It is to be remarked that it is patent from the opinion of the court that, if the shares of stock had been considered as in anywise the equivalent of the bonds, in which the property of the bank was invested, the tax would have been held invalid, despite the authority to tax the stock given by the act of congress, as such authority would not have been construed as authorizing a violation of the faith of the United States by taxing bonds issued by the government, which were not subject to taxation. It follows then that not only did this decision refute the claim of equivalency between the tax on the bank or its property or franchises and the tax on the stock in the names of the stockholders, but by a negative affirmative it demonstrates that if the two are equivalent the tax in this case would be illegal, since the record here admits that a sum, at least the equivalent of the capital, surplus and undivided profits of the bank was invested in bonds of the United States. The contention of equivalency then destroys itself, and if it were conceded would bring about the illegality of the tax, in support of the legality of which the argument is advanced.

Following this came the decision in *People vs. Tax Commissioners,* (1866) 4 Wall. 244, in which, reiterating the decision in *Van Allen vs. The Assessors,* it was held, because the property of the bank was distinct and separate from the shares of stock in the names of the shareholders, therefore the latter were not entitled to deduct

exempt property belonging to the bank from the assessment on their shares. The court said, again through *Mr. Justice Nelson,* and in part quoting from the opinion in the *Van Allen case,* p. 258:

"The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. * * * The interest of the shareholder entitles him to participate in the net profits earned by the bank, in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain, of the corporation, after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him;" and, we add, of course, is subject to like taxation.

The next case in order of time is *Bradley vs. The People* (1866), 4 Wall. 459. The question which the case presented was whether a tax on the property or rights of the bank was the legal equivalent of a tax on the shares of stock in the names of the shareholders. The argument of counsel was that in determining this question the method was immaterial, but the substance would be considered. The argument urged (p. 460): "Neither the national government, the creator of the species of property now taxed, nor the shareholders can be interested in the *methods* which may be adopted by the state for the imposition of the tax." The court, through *Mr. Justice Nelson,* after referring to the decision in *Van Allen vs. The Assessors,* and the tax there imposed, said (p. 462):

It was in that case attempted to be sustained on the same ground relied on here, that the tax on the capital was equivalent to tax on the shares, as respected the shareholders. But the position was answered that, admitting it to be so, yet, inasmuch as the capital of the state banks may consist of the bonds of the United States, which were exempt from state taxation, it was not easy to see that the tax on the capital was an equivalent to a tax on the shares.

In *National Bank vs. Commonwealth* (1870), 9 Wall.

353, a statute of the state of Kentucky which imposed a tax of fifty cents a share on bank stocks, or stock in any moneyed corporator, of loans or discounts owned by individuals, corporations or societies, was held to authorize a tax on the shares of the stockholders, as distinguished from the capital of the bank invested in federal securities, and this, although the tax was collected from the bank instead of the individual stockholders. In the opinion of the court, delivered by *Mr. Justice Miller,* a summary statement was made of the doctrine enunciated in the prior decisions recognizing the distinction between the property owned by an incorporated bank as a corporate entity and the property or interest of the stockholders in such bank, commonly called a share.

These cases, interpreting the act of congress, have never been questioned, and indeed form the basis upon which the taxation of the shares of stock in the names of the shareholders allowed by the act of congress has been made efficacious for the purpose of bringing a vast amount of property within the taxing power of the states, which would have been excluded had not the principles which the cases announced been established. If the postulate upon which they necessarily rest be overthrown by saying that there is an equivalency between the taxation of the property of the bank and the shares of stock in the names of the stockholders it would follow that the principles upheld by the cases would disappear with the destruction of the reasons upon which they were placed. It would then necessarily follow that the grant by congress of authority to tax the shares of stock in the names of the shareholders could not be exercised where the bank held bonds of the United States exempt from taxation; that the two things being the same, the shareholders would be entitled to deduct the property of the bank from the sum of the taxation of the shares; in other words, that the right to tax the shareholders would be a vain thing.

This opinion says further:

There being then no equivalency between the assess-

ment of the bank and the assessment of the shares in the names of the shareholders, it follows that the tax here complained of, which was assessed on the franchise or intangible property of the corporation, was not within the purview of the authority conferred by the act of congress, and was therefore illegal.

Whilst this conclusion suffices to dispose of the case, we advert to the contention that although there may not be a legal equivalency, there is nevertheless one in fact, and therefore the tax should be sustained. It may be that in the case before us, there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the act of congress. But that this is not the necessary result of the taxing statute is too plain to require comment. The fact that it is not is well illustrated by *Henderson Bridge Company vs. Kentucky, supra,* for there the tax which was sustained on the franchise or intangible property of the corporation admittedly enormously exceeded the total of the capital stock, and proceeded upon the theory that the bonds issued by the corporation were an element to be taken into consideration in fixing the value of the franchise or intangible property. If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows, since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration.

What we have quoted demonstrates beyond question that the supreme court of Iowa either erred in holding that the property taxed was in effect the property of the bank, or erred in holding that the bank was not entitled to have its bonds deducted.

If the entire opinion of the Iowa supreme court is to be

accepted in connection with the construction of section 1322, we submit that our conclusion that this section as construed by that court contemplates a tax on the bonds is incontrovertible, so that to this extent the section is invalid and the decree below must be reversed.

The case is squarely within the doctrine laid down by this court in

Railroad Co. vs. Pennsylvania, 198 U. S. 341, 353,

where the court said:

This court has so frequently held that a tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and in consequence no tax can be thus levied which includes property that is otherwise exempt. *Bank of Commerce vs. New York City,* 2 Black 620; *Bank Tax Case,* 2 Wall. 200; *Pullman's Car Co. vs. Pennsylvania,* 141 U. S. 18; *Fargo vs. Hart,* 193 U. S., 490, 498, 499.

The character of the statement from which the value of the shares is to be ascertained in the case at bar is wholly similar to the statements which are the basis of the assessments in the express cases.

The case of

Stapylton vs. Thaggard, 91 Fed. 93,

decided by the circuit court of appeals for the fifth circuit, sustains our contention. There, the law of Florida

contained the following provision as to the assessment of shares of national banks:

All shares of the banking association, etc., * * * held by any person or body corporate shall be included in the valuation of the personal property of such person or body corporate in the assessment of taxes in the town or city where such banking association is located and not elsewhere * * * and for the purpose of securing the collection of taxes assessed upon said shares, each banking association shall pay the same as the agent of each of its shareholders, and the said association may retain so much of any dividend belonging to any shareholder, as shall be necessary to pay any taxes levied upon its shares.

As to this provision the court says:

Under these provisions it is difficult to construe the assessment complained of in this case as one upon the shares of the bank, and against the shareholders.

In

National Bank of Virginia vs. City of Richmond,
42 Fed. 877,

a bill of taxes was assessed upon the shares of the bank, of which the following is a copy:

1889. (Ward 3.)

The Merchants' National Bank to City of Richmond, Dr.,

Tax on shares of stock	$255,000
Less value of real estate	53,942
	$201,058
At $1.40	$2,814.81

With reference to this assessment the court says:

The tax in these cases is assessed upon all the shares issued by the association *in solido* against the association, and the cashier is required by the collector to pay it or be subject to a penalty. In the case of *First National Bank of Richmond,* 39 Fed. Rep. 309, (tried in this court a short time ago), the record in which case has gone to the supreme court, it was held by the district judge that such an assessment of a tax on the whole of the shares of a bank, at their market value, was nothing else than an assessment of the capital stock of the bank, and was not authorized by the act of congress, and that to tax the shares of the bank at all they must be listed in the name of the shareholder. Any other view of the law than this would work a grievous wrong to the shareholders of national banks. By the law of Virginia, every person assessed for a tax upon his personal property has a right to deduct from the valuation the amount of his indebtedness, so that he may be charged only with taxes on what he owns, when a balance is struck between him and his creditors. To assess the bank on all its shares *in solido* is to prevent entirely a shareholder therein from this benevolent and just provision of law.

The case of *First National Bank of Richmond* referred to in the extract just made, was decided against the validity of the tax by the circuit court. The appeal to this court was dismissed by the plaintiff in error (149 U. S. 769), so that the merits of the case were never presented to this court.

Another case of like character is

Brown vs. French, 80 Fed. 166.

This was an action to enjoin a county treasurer from selling certain real estate which belonged to the First National Bank of Helena, for certain taxes claimed to be due from the bank. The bank was in the hands of a receiver, who contended that the tax was illegal, because in effect an assessment upon the property of the bank and not on the shares, and further that he could not be required to pay because the bank was insolvent. The Montana statute provided for an assessment of the shares to the stockholders and for a verified statement from the cashier to aid the assessor, and that the stockholders should have a right to make the deductions and exemptions allowed by law in assessing the value of other personal property. We make the following extract from the opinion:

It is set forth in the bill that the said bank never made out a verified list of said property, but, in the latter part of June of the said year 1896, George H. Hill, then the assistant cashier of said bank, for it handed to said Bickett, as deputy assessor for said county, the following:

Capital	$800,000.00
Surplus	100,000.00
Undivided profits	94,000.00
	$994,149.01
U. S. bonds	$100,000.00
Real estate	

It is set forth, also, in the bill, that the said bank did not for the year 1896, but that the said assessor did for that

year, prepare the assessment list of property belonging to the said bank, and that he (the assessor) estimated for himself the value of the property. The assessor added the $100,000 in United States bonds, and the value of the real estate, estimated at $147,290, together, and then deducted the amount from the said $994,149.01, and then took as the value of the stock two-thirds of the amount left, which, according to the calculations of said assessor, left $497,906. For this amount the bank was assessed. The deputy, Bickett, in his affidavit claimed that this was the value of the shares of stock, and this stock was assessed to the bank.

The return, if any, of the bank was of capital. The entry of "stock" by the assessor opposite to the said sum of $497,906 would appear to also indicate capital stock, and not the value of shares of stock. There is no number of shares indicated. It is stated in the affidavits that the bank has been accustomed to make such returns for assessments for several years prior to 1896. This would not make it legal.

This assessment seems to have been made very much as the assessments were made in the case at bar. Here, as there, the entry indicates an assessment upon the property of the bank and not on the value of the shares of stock. Here, as there, no number of shares is indicated. That case decided that such an assessment is an assessment on the capital of the bank and not upon the shares of the shareholders. The court says further in the opinion:

I am unable to see how the term "capital," as returned by Hill, the assistant cashier, can be construed to mean shares of stock. There is a clear and well-understood distinction between the terms "capital" and "shares of stock." When the assessor made his computation, he found $497,906 of stock. If this meant the value of the stock, we do not have the number of shares, nor by whom held. Unless the bank owned the shares of stock, the assessor had no right to assess the same to the bank.

In

First National Bank vs. Fisher, 45 Kans. 726,

there was another assessment of the shares of a national bank *in solido,* and here again the assessment was held to be an assessment, not upon the shares, but upon the capital of the bank, and therefore void, because in contravention of the federal statutes.

Other cases to the same effect are:

National Bank of Chemung vs. City of Elmira, 53 N. Y. 49.

Sumpter County vs. National Bank of Gainesville, 62 Ala. 464.

City of Springfield vs. First National Bank, 87 Mo. 441.

First National Bank vs. Meredith, 44 Mo. 500.

National Com. Bank vs. City of Mobile, 62 Ala. 284.

National Bank vs. Hoffman, 93 Iowa 119.

The manner in which the assessments in the case at bar were made is significant in this connection. The duplicate assessment roll set out on page 9 of the transcript, covering the first assessment, shows that this assessment, which was for $55,171.98, is on account of *"moneys and credits."* The second duplicate of the assessment roll giving the assessment $122,871, is on account of *"corporation stock"* (trans. p. 11). In the assessment roll itself, which was retained by the assessor, the amount is opposite *"moneys*

and credits." On the assessment book referred to at page 14, the assessment is under the head *"moneys and credits."* On the tax list it is referred to as "taxable value of personal" (trans. page 16). It does not anywhere appear that the assessor in fact attempted to assess anything except the property of the bank, or that the tax was levied on anything else.

A case somewhat in point upon the general question that has been discussed in this section of our brief is

People ex rel. vs. Coleman, 126 N. Y. 433.

In that case the Union Trust Company was assessed by the tax commissioners of the state of New York, under a statute of that state, upon its capital stock for the year 1889. Its shares were of the par value of $100 and were worth in the market five times that much. It was assessed according to the premium value of its shares in spite of the protest and the presentation before the assessors of uncontested proof of the actual value of its capital and surplus. The assessment was sustained by the court in the first instance, but was reversed by the court of appeals and the tax cancelled. The opinion says:

The relator challenges the assessment, and through all the proceedings has persistently raised and pressed the inquiry, not so much as to the mode or manner of ascertaining value, but rather as to what is the precise thing to be valued, whether the capital stock of the company or the capital stock held in shares by the corporators. If these are the same, or, in any just sense, equivalents, either might be valued without substantial error, but if they were not such, we must determine which is to be valued before we can solve the problem of how to value it.

Now, it is certain that the two things are neither iden-

tical nor equivalents. The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise and the good will of an established and prosperous business.

The court says further:

And thus the two things—the company's capital stock and the shareholder's capital stock—are essentially and in every material respect different. They differ in their character, in their elements, in their ownership and in their values.

The court then refers to the confusion and trouble that have arisen because these two different things, namely the company's capital and the shareholder's stock, are denominated alike, capital stock, and quoting the section of the statute under consideration, proceeds:

There are reasons in abundance for the conclusion that by the phrase "capital stock" the statute means not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise, and the chief factor in its safety. One ample reason is derived from the fact that the tax is assessed against the corporation and upon its property, and not against the shareholders, and so upon their property. In theory, every tax is charged against some person, natural or artificial, resident or non-resident, known or unknown. It is assessed not upon property, irrespective of ownership, but against persons in respect to their property (23 N. Y. 215) and effects not merely a lien, but also a personal liability. On the assessment rolls in this case

appeared the name of the relator as the person assessed, and the amount of the tax became a charge against it. Of course, it could only be assessed and taxed in respect to its own property, that which in its corporate character it owned and possessed, and so it follows inevitably that the statute concerns the company's capital stock, that is, its real and actual capital, and not in any respect the share stock which it does not own and whose possessors have not been assessed.

Another reason is found in those terms of the statute which include and exclude respectively specific kinds or classes of property in the corporate ownership. Thus the assessment is to be laid not merely upon the capital stock of the corporation, but also upon its surplus. No such explicit direction was necessary, except upon the assumption that by the words "capital stock" was meant simply "capital," which would not include surplus, and so required that it be subjected by name to the valuation. If the share stock was meant its value would include surplus and makes its specification not only needless, but confusing. But while the statute includes surplus by specific mention, it excludes franchise by omitting it. The omission of franchise is emphasized by the careful inclusion of surplus. It is fully and definitely settled that the tax imposed by the statute is not upon the franchise. (*People vs. Comrs. of Taxes*, 2 Black 620). But if that be so, it is not upon the share stock, for that represents the value of the corporate franchise, as a part of the total of the corporate property. And so, both by what it specifically includes and silently excludes, the statute itself informs us that by "capital stock" it means and intends the company's actual capital paid in and possessed, and not at all or in any sense the share stock.

V.

The statute cannot be sustained upon the theory that it makes the bank a mere collecting agent for the state.

Referring again to *Stapylton vs. Thaggard,* 91 Fed. 53, it is there said:

As we construe the cases, from *First Nat. Bank vs. Com.,* 9 Wall. 353, to *First Nat. Bank vs. Chehalis Co.,* 166 U. S. 440, 17 Sup. Ct. 629, the bank is made to pay the taxes assessed by the state against its shareholders, when the state statutes lay such duty upon the bank, upon the theory that the shares are valuable, and that the bank has assets in its hands belonging to the shareholders from which it can recoup.

In

Bank vs. Commonwealth, 9 Wall. 353, 362,

the court, speaking through Mr. Justice Miller, says:

If the state of Kentucky had a claim against a stockholder of the bank who was a non-resident of the state, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnished, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the state on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the government.

In other words, these cases are predicated upon the proposition that the payment made by the bank is made out of the funds of the shareholder. It is one thing to say that the bank may be required to act as a collecting agent; but quite another and radically different thing to say that it shall itself pay the debt from its own property.

This distinction has been definitely recognized by the supreme court of Iowa. See

Hershire vs. First National Bank, 35 Iowa 272, 277.

That was a suit against a national bank to recover taxes levied upon its shares. There was a demurrer to the petition which was sustained. The petition contained no averment that the bank had money in its hands out of which it could make this payment, and the supreme court held that the absence of any funds in the hands of the bank belonging to the shareholder was fatal to the right of the plaintiff to recover. It says, page 277:

In brief, our view of the statute is, that it effectuates a statutory garnishment of the bank, to secure the payment of the taxes due from its shareholders. To make it liable, it must be shown that the bank now has or has had dividends or other money or property belonging to the delinquent shareholder. Whereas the Kentucky statute makes the bank liable absolutely for the taxes upon shares. If that is better than ours, it is for the legislature, and not for us to enact it here.

In this same opinion the court recognized the distinction between the shares and the capital stock of the bank, and the fact that the bank has no interest whatever in the shares. The court says on this question:

Of course, we are not here questioning or discussing the right of the banking association to retain the dividend for the purpose of paying the taxes, or of providing by rule or by-law, properly made and recorded, for the liability of the shares themselves for any indebtedness of the shareholder to the bank, or the like, so that any transfer of such shares could not affect the right of the bank as against a purchaser having notice of such by-law. All that we here intend to say is, that the shareholder himself in legal contemplation owns, controls and manages his own shares, nothing different in fact being shown. And hence, the banking association is not liable for the tax due from holders of shares in the capital stock of such banking association. Other averment and showing must be made that the shares are in fact under the control or management of the association, before it can be made liable.

Cleveland Trust Company vs. Lander, 184 U. S. 111,

is not in conflict with *Van Allen vs. The Assessors* and the long line of cases of the same class. In the *Lander* case the statute provided for taxing the shares of the shareholder. The doctrine of *Van Allen vs. The Assessors* was re-affirmed, and the question which arose under the constitution and laws of the state of Ohio was left for the determination of the supreme court of that state.

VI.

If section 1322 *requires the taxation of the shares of the shareholders to the bank, it is void, because within the inhibition of the fourteenth amendment.*

If our contention that this section as construed by the Supreme Court of Iowa in fact contemplates a tax on the property of the bank is unsound, and what it requires is a

tax upon other and distinct property, viz: The shares owned by the shareholders, as distinguished from the bank, then we assert that to tax the bank upon property which it does not own is to deprive it of its property without due process of law, and that for this reason this section and the taxes levied under it are void.

To say baldly and unequivocally that the shares, which belong to the shareholders, shall be taxed to the bank, which does not own them, and that the bank shall be required to pay these taxes without an express provision for its reimbursement, is to assert a proposition that is in violation of all established principles of taxation. If the legislature may tax the shares of the shareholder to the bank there is no reason why it cannot tax his real estate to the bank, or the real estate of anyone else to the bank.

To put this in the concrete, suppose that A owns $100,000 invested in government bonds and no other property. Can the legislature say to A that because this property is not taxable it will assess to him the property of B in an equal amount? If this were so, the state could take these bonds, exempt from taxation, to satisfy the taxes levied against A upon the property of someone else.

In the case of the bank that is plaintiff in error, suppose that A. owns ten shares of stock. Could the state under this section of the Iowa code assess this property to the bank? If so, then in the event that the bank did not pay, it might recover a judgment against it for this tax, and the property on account of which the tax was levied would not be subject to execution under this judgment to satisfy the debt, but the tax would be a lien upon the bank's real estate.

This court has held in numerous cases, including

Railroad Co. vs. Pennsylvania, 198 *U. S.* 341.

Corry vs. Baltimore, 196 U. S. 446,

that the enforcement of a tax which a state has no jurisdiction to levy constitutes a taking of property without due process of law within the prohibition of the fourteenth amendment to the constitution of the United States. Under the principle announced in these cases, the exaction of any tax which the state had not the power to impose would come within the same prohibition.

The cases referred to are cases where the state had no power to impose the tax because the property was outside of its jurisdiction, so that the question which remains for consideration here is, assuming that this statute does exact from the bank a tax upon property which it does not own, whether this is within the power of the state.

In

State Tax on Foreign-held Bonds, 15, Wall. 300, 319,

this court recognizes limitations upon the power of the state to tax. The court says:

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, exercises, or licenses, it must relate to one of these subjects. It is not pos-

sible to conceive of any other, though applied to them, the taxation may be exercised in a great variety of ways.

Cooley on Taxation (3 *ed.*) *page* 1,

defines taxation as follows:

Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs.

On page 3, the author says:
possessions, by the use to which the money contributed is

The person upon whom the demand is made, or whose property is taken, owes to the state a duty to do what shall be his just proportion toward the support of government, and the state is supposed to make adequate and full compensation, in the protection which it gives to his life, liberty and property, and in the increase to the value of his applied.

This idea of a just proportion is fundamental and is the basis of the many controversies which arise as to discrimination and lack of uniformity in taxation.

It is obvious that it would be destroyed if the assessment were based, not upon the property of the person paying the tax, but upon the property of someone else. Take the present case. Here, by reason of the fact that the bank owned exempt property, the value of its property subject to assessment was in round numbers $55,000. The value of the property of the shareholders was $122,000, more than twice

the value of the property upon which the bank was subject to taxation.

Cooley lays down on page 12 certain maxims of policy, as follows:

Writers on political economy lay down certain principles which should govern the imposition of taxes, but these are guides rather to the legislature than to the courts. The author of "Wealth of Nations" in particular has enumerated certain maxims, the subject of which may be stated as follows: 1. That the subjects of every state ought to contribute to the support of the government *as nearly as possible in proportion to the revenue which they respectively enjoy under its protection.* 2. The tax which each is to pay ought, as respects the time and manner of payment, and the sum to be paid to be certain and not arbitrary. 3. It ought to be levied at the time and in the manner in which it is most likely to be convenient to the contributor to pay it; and 4. It ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury.

Here this principle is again recognized.

On page 27, the author takes up taxes that the governments have been accustomed to levy, and describes capitation taxes, land taxes, taxes on houses, taxes on income, taxes on implements, taxes on the carriage of property, taxes on the wages of labor, taxes on servants, horses, dogs, carriages, etc., taxes on the interest of money, taxes on dividends, taxes on legacies and inheritances, taxes on sales, bills of exchange, gold and silver bullion, etc., taxes on newspapers, taxes on legal process, taxes on consumable luxuries, taxes on exports, taxes on imports, taxes on corporate franchises, taxes on the value of property, which he

says have been the main reliance of the states, and taxes on amusements.

It does not appear that any of these taxes have ever been levied with reference to the property or employment or person of someone other than the person paying the tax.

The theory of all taxes based upon value is, that the benefits received are in proportion to the value of the property owned, and therefore that the payments based on the values are equitably proportioned.

We assert that to change this method of taxation, and if it may be done in one instance, it of course may be done in any instance, is to go in direct opposition to this fundamental proposition which underlies all of our methods of taxation. Justice Field, while on the circuit, said in

County of Santa Clara vs. Southern Pac. R. Co., 18 *Fed.* 385, 392:

No one would pretend that the mortgagor should pay without such allowance the tax chargeable to the bank, nor that the bank should pay the tax chargeable to the mortgagor, except upon like condition. It would be difficult to state any principle which would justify the exaction from one of a tax leviable on the interest of the other. No power in any state has ever been asserted going to that extent, except the power to confiscate. The exaction would not be the taking of property by due process of law, even upon the theories as to what constitutes such process asserted in this case. It would be sheer spoilation by arbitrary power.

The language used is emphatic, but the emphasis is warranted by the suggestion that one person should be taxed on the property of another. Justice Field says the only

power ever asserted going to this extent is the power to confiscate; that it would be a violation of the constitutional provision which we invoke; that it would be sheer spoliation by arbitrary power.

In

United States vs. Railroad Company, 17 Wall. 322, 326,

it is said:

A tax is understood to be a charge, a pecuniary burden, for the support of government. Of all burdens imposed upon mankind that of grinding taxation is the most cruel. *It is not taxation that government should take from one the profits and gains of another.* That is taxation which compels one to pay for the support of the government from his own gains and of his own property.

Such an exaction as is in controversy here goes so far beyond the established principles which regulate taxation that it may not be even classed as a tax. It is a mere arbitrary exaction, unwarranted by any law.

In

Henkle vs. Town of Keota, 68 Iowa 334,

the Supreme Court of Iowa had under consideration the

question whether under a different law which then existed shares in a bank organized under the general incorporation laws of the state could be assessed to the shareholders. In the course of its discussion the court says at page 340:

But as we have seen, shares in the corporation are the property of the person owning them. *They cannot be taxed to the corporation,* and the statute does not so provide; but it does provide that they shall be taxed to their owners.

Here the court recognizes the lack of power to tax property to one who is not its owner.

The supreme court of Iowa was not willing in the present case to hold that the state of Iowa had the power to tax the bank upon the property which it did not own and it therefore was driven to the assertion of the doctrine of equivalency as it is set out in the opinion. It must be borne in mind, however, that this doctrine cannot be invoked in order to escape the dilemma which is presented to the defendant in error; because if the defendant in error concedes that the property taxed is in effect the property of the bank, then the bank is entitled to its deduction, because the bonds are exempt. It is only when the defendant in error denies this and asserts that what was taxed was the shares, something not the property of the bank, and that therefore the doctrine of *Van Allen vs. Assessors,* is applicable, that the question which we are now discussing is presented.

This property which is subject to this assessment was either the property of the bank or the property of the shareholders at the time the assessment was made. It cannot be treated for the purpose of preventing an exemption, as the property of the shareholder, and at the same time, for the purpose of evading the question we are now urging, as the

property of the bank. It is either one or the other; and if it is the property of the bank, it is incumbent upon the defendant in error to explain why the bank was not permitted to deduct its exempt property; and if it is the property of someone else, it is incumbent upon the defendant in error to squarely meet the question, that the state has not the power to tax to one person property owned by any other.

There is a dearth of authority upon this question, because so far as we can ascertain, neither the supreme court of Iowa nor any other court has asserted the proportion as it is presented here.

The practical result of the application of this proposition here is to more than double the taxes of the plaintiff in error. If it were taxed upon its own property it might deduct its bonds. If it is to be taxed upon the property of someone else, it can make no deductions, not even those that the owner of this property might have made.

It is unnecessary for us to defend the policy of the law in exempting these bonds from taxation through the federal constitution and statutes. It is this exemption that makes them desirable as investments, and any criticism of the investor must involve a like criticism of the law which grants the exemption and of the act of the federal congress authorizing the issuance and sale of the bonds.

If a state may assess to one property which he does not own, this exemption may be practically nullified. Any state may pass a law saying that banking and other corporations shall be taxed upon their capital where it is not invested in exempt property, and that, to the extent to which it is so invested, the shares of their stockholders shall be assessed to them.

It may enact that where a private individual owns United States bonds, he shall be taxed to the full value of these bonds, or to double their value, or to any other mul-

tiple of their value that seems proper, upon the property of some one else, exempting the property of the other, and so penalizing the ownership of exempt bonds. We do not see why, to evade double taxation, it would not be just as proper to tax to the holder of government bonds an amount equal in value of the public property as to tax to him the property of another individual.

The purpose for the enactment of this statute is obvious. The extract which we have made from *Bank vs. Rerick*, in the second subdivision of this brief, shows that where stock in a national bank is assessed to the shareholder, he has a right to deduct debts owing in good faith from the amount of the assessment. The purpose of this statute was evidently to devise a plan by which the bank should be prevented from deducting its exempt property and the shareholder should be prevented from deducting his debts. The property taxed was to be the property of the shareholder, so that the exempt property of banks could not be deducted, and the person to whom it was to be taxed was the bank, so that the debts of the shareholder could not be deducted. The statute is an attempt at evasion. It is an attempt to do by indirection what the constitution of the United States and the laws of the United Staes prohibit. It is this that has given rise to the embarrassments which confronted the supreme court of Iowa and confront the defendant in error here. It is impossible to hold that this is a tax on the property of the bank without permitting it to make the deductions which it demands. It is impossible to hold that this is a tax upon the property of someone else without asserting that there is power to tax the bank upon property which it does not own and in which it has no interest. We are indifferent which horn of the dilemma may be selected by the defendant in error. It cannot evade both of them.

VII.

The relief to which the plaintiff in error is entitled.

(a) If section 1322 as construed by the supreme court of Iowa, requires that the bank pay the taxes upon property which it does not own, the statute is void, and the entire assessment and tax based upon it is invalid. Consequently, if this theory of the case be the true one, the entire assessment in question should be set aside.

(b) If the statute contemplates an assessment upon the property of the bank, then the basis upon which the assessment should be computed, as determined by the supreme court of Iowa, is as follows: From the gross assets of the plaintiff in error, as shown by the proof, should be deducted its gross liabilities, aside from its liability on account of the capital stock, surplus and undivided profits. The balance represents the net assets of the bank, and, in the case at bar, where the capital of the bank is not impaired, is equal to the sum of the capital stock, surplus and undivided profits. From this balance should be deducted the bonds of the United States and premiums, that is, the amount invested in the bonds, and under the laws of Iowa, the other stocks, and real estate owned by the plaintiff in error. That this is the proper method of computation, see

Campbell vs. City of Centerville, 69 *Iowa* 439.

The real estate is deducted under code section 1322, and the other shares of corporation stock are deducted because under section 1325 of the code, set out in the second subdi-

vision of this brief taxes on these shares owned by the bank are to be paid by the corporation which issued them, the bank being bound to reimburse it therefor.

The corporations whose stock is included were all corporations organized under the laws of the state of Iowa, except that the Citizens National Bank was organized under the laws of the United States. Its stock, however, is to be taxed in the same manner. The assessment therefore should be upon the following basis, taking the figures from Exhibit "1," shown on page 7 of the transcript:

Capital stock	$100,000.00	
Surplus	25,000.00	
Undivided profits	9,871.98	
Total		$134,871.98
Deductions, U. S. bonds	$ 57,000.00	
Premiums on same	5,060.00	
Other stocks	4,040.00	
Real estate	8,480.00	
Total		$ 74,580.00
Balance		$ 60,291.98

If any assessment can be made against the plaintiff in error we submit it must be in the amount above stated.

The record shows that the taxes in question were paid under protest. To avoid any misapprehension as to the effect of this payment, we call attention to section 1417 of the code of Iowa, the material portion of which is as follows:

The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon.

It is established in Iowa that this authorizes the refunding of illegal or erroneous taxes, though voluntarily paid, and after they have been divided up and distributed among the state, school, road and other funds; and where the supervisors refuse to refund them, they may be recovered from the county:

Lauman vs. Des Moines County, 29 Iowa 310;
Richards vs. Wapello County, 48 Iowa 507;
Winzer vs. Burlington, 68 Iowa 279;
Thomas vs. Burlington, 69 Iowa 140;

and a suit may be brought at any time within five years after the payment is made.

Lonsdale vs. Carroll County, 105 Iowa 452.

In the case at bar, there was no way by which the tax, which is levied as an entirety, could be divided, and it was incumbent upon the plaintiff in error either to pay under protest or permit its property to go to tax sale, with the accruing penalties.

It will not be contended that this constituted a waiver of its appeal from the assessment or of its right to recover back any taxes which on the final determination of that appeal might appear to have been illegally exacted.

Respectfully submitted,

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